Id. at 165-166. The Ninth Circuit, as well, advocates a limited remand to determine the issue of whether the sentencing court would have sentenced differently under a non-mandatory guideline scheme. *See United States v. Ameline*, 409 F. 3d 1073 (9th Cir. 2005). The Ninth Circuit noted the inherent unfairness of requiring the defendant to show that the District Judge would have imposed a different sentence when at the time there was no reason for the sentencing court to so indicate. *Id.* at 1080.

> To leave standing [a] sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of the judicial proceedings.

United States v. Hughes, 396 F. 3d 374 (4th Cir. 2005).

Rather than considering why it stands criticized for its rigid application of the plain error analysis, the Eleventh Circuit has simply turned this Court's decision in *Booker* into a lottery of sorts. If a defendant is fortunate enough to have a more talkative judge, there may be something in the record to meet the incredibly high standard of proof the Eleventh Circuit has set for the third prong of the analysis. However, a less chatty district judge who simply listens and imposes a sentence at the lowest end of the then mandatory guideline range will not have provided a defendant with the magic words required to obtain a new sentencing in the Eleventh Circuit. *See United States v. Antonakopoulos*, 399 F. 3d 68, 81 (1st Cir. 2005) ("The existence of prejudice should not turn on how vocal the district judge was.").

Concurring in *Ameline*, 408 F. 3d at 1105, Judge Gould noted:

> [I]t would be most unfair and unreasonable for us to ground our prejudice on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained to quietly follow the law. Our judicial system is predicated on judges following the law, and, so far as is humanly possible, keeping their personal opinions to themselves.

Similarly, defendants who have the misfortune of having the Eleventh Circuit review their *Booker* claims, are having their unconstitutional sentences reviewed under a different, higher, standard than other defendants around the nation.

Thus, the writ in this case should be granted for two significant reasons:

1. There is a distinct and obvious conflict between the circuits on the application of the plain error analysis to *Booker* cases which cannot be reconciled; and,

2. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. *See United States v. Paladino*, 401 F. 3d 471, 483 (7th Cir. 2005).

CONCLUSION

The Eleventh Circuit has incorrectly applied the plain error analysis to the petitioner's claim under *Booker* to have her unconstitutional sentence vacated. The Eleventh

Circuit's decision is in conflict with the other circuits and results in a miscarriage of justice. For the reasons stated above, this Court should grant Petitioner's writ of certiorari.

Respectfully submitted,

MICHAEL J. TROST
Georgia Bar No. 716685

1800 Peachtree Street
Suite 300
Atlanta, Georgia 30309
(404) 352-9300
Counsel for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114

D. C. Docket No. 02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed April 12, 2005)

Before BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

BARKETT, Circuit Judge:

Shiraz Dhanani, Amzad Lalani, and Wendy Lalani appeal their convictions and sentences for transporting in

---

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

interstate commerce stolen goods of at least $5,000 in value, as well as conspiracy to do so, in violation of 18 U.S.C. §§ 371 and 2314. All three were convicted after a jury trial on September 17, 2003. On February 18, 2004, the district court sentenced Dhanani and Wendy Lalani to 63 months' imprisonment each, and sentenced Amzad Lalani to 121 months' imprisonment.

We have carefully considered the record as it relates to all three appellants and are satisfied that there is sufficient evidence to support the jury's verdict. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999) ("A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence."). We also find no merit in any of the appellants' other challenges to their convictions.

We likewise find no error in the sentences imposed by the district court. In particular, any error under *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), fails the third prong of plain error review as interpreted by *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005).

AFFIRMED.

United States Court Of Appeals
For the Eleventh Circuit

No. 04-11114

District Court Docket No.
02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Apr. 12, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 12, 2005
For the Court: Thomas K. Kahn, Clerk
By: _ Jackson, Jarvis

ISSUED AS MANDATE

JUL 07 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI

(Filed Jun 8, 2005)

Before: BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

---

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rose Barkett
UNITED STATES CIRCUIT JUDGE